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Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1808

In the Supreme Court of the United States

October Term, 1985

THORNTON DAVIS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether due process is violated when hearsay evidence is admitted pursuant to exceptions noted at law when, if error, it is harmless beyond a reasonable doubt.

2. Whether the verdict, supported by testimony as to each material element of the charge, was as a matter of law, against the manifest weight of the evidence.

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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and in the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, unanimously affirmed the convictions. Likewise, the Supreme Court of Ohio overruled Petitioner's motion for leave to

appeal and dismissed sua sponte for the reasons that no substantial constitutional questions exist therein.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

On August 21, 1984, Petitioner was indicted, along with Frederick Seals, in Case No. CR 192325 for Robbery, in violation of Ohio Revised Code, Section 2911.02. The Petitioner was also charged with two specifications for previous aggravated felony convictions, to-wit: Robbery in Case No. CR 167418 on December 23, 1981 and Aggravated Burglary in Case No. CR 162143 on January 15, 1982, in violation of Ohio Revised Code, Sections 2911.02 and 2911.11, respectively.

On November 8, 1984, the Petitioner and Frederick Seals were found guilty after a jury trial of Robbery. The specifications had been previously stipulated to by trial counsel.

Petitioner filed a timely appeal to the Court of Appeals, Eighth Judicial District, which was denied on October 31, 1985. Mr. Seals also filed a timely appeal which was subsequently denied as to the substantive background of the case but was reversed and remanded for proper sentencing in accordance with the law.

On March 5, 1986, the Ohio Supreme Court overruled Petitioner's motion for leave to appeal and dismissed the appeal sua sponte.

STATEMENT OF THE FACTS

On July 7, 1984, at about 4:30 p.m., Willie Presley went to the Taste of Honey Lounge in Warrensville Heights, Cuyahoga County, Ohio. While there, he met an acquaintance, Frederick Seals, that he had met once previously and stopped to chat with him. Frederick Seals introduced him to Thornton Davis, who had come up to sit next to them at the bar.

After about twenty minutes, Petitioner and Seals left the bar, whispering as they left. Presley left about ten minutes later and saw both men waiting outside the bar. Appellant then approached Presley and asked for some money, a loan. Presley said no, at which time Petitioner struck Presley at his pocket and pushed him down. Doing this, the money Presley was carrying fell to the ground. Petitioner picked up this money as Presley crept away and into the bar. When Presley returned, Petitioner Seals and the packages Presley had been carrying were gone. Presley observed both Seals and Petitioner in Seals' car and Petitioner came back and threatened him at that time.

Shortly thereafter, Warrensville Heights Police approached a stopped car which matched the description that had been broadcast in response to Presley's call to the police. John Kalavsky responded to speak with Presley while two other officers held Petitioner and Seals at Seals' car. While talking to Presley, Kalavsky received a detailed description of what happened and, in particular, what was stolen. When they returned to Seals' car, all the items described were found in the car.

Seals testified that he had met Presley earlier that day and drove him to visit a photographer friend, not

known to Presley, who wasn't home. He and Presley stopped at a carry-out store and got some more beer and eventually returned to the bar.

He stated that during the course of the day, he'd had about twelve to thirteen beers between 8:00 a.m. and 5:00 p.m., and that he was very drunk. He remembered that shortly after leaving the bar with Petitioner, Presley came out and put his hand on his shoulder, an act he found offensive. He stated that he and Presley began to scuffle and Petitioner stepped between them and pushed them apart (R. 143). After that, he stated that Petitioner wanted to go to the barbershop, that they got into his car with Seals driving and left. He didn't remember anything else until being stopped by the police (R. 144).

REASONS FOR DENYING THE WRIT

1. Due Process is not violated when hearsay evidence is properly admitted pursuant to exceptions noted at law and when, if error, it is harmless beyond a reasonable doubt.

The objected to evidence was properly admitted pursuant to Ohio Rules of Evidence 801 (D) (1) (C) as though it was not hearsay. It was also properly admitted under the theory expressed in *United States v. Elemay* (9th Cir., 1981), 656 F.2d 507, and *State v. Lancaster* (1971), 25 Ohio St. 2d 88. "Prior identification of the accused may be shown by the testimony of a third person to whom, or in whose presence the identification was made, if the identifier also testifies."

It was also acceptable testimony under the "excited utterance" exception to hearsay set forth under Ohio Rules of Evidence 803 (2).

Finally, as the Court of Appeals, Eighth Judicial District, pointed out, there was no denial of confrontation. Petitioner had the opportunity to cross-examine Presley, the declarant, as well as Officer Kalavsky. The Court of Appeals also did not state, as Petitioner alleges, that it was clearly error, merely that it was non-prejudicial. Further, the Court ruled that the evidence was not by its nature unreliable or not subject to cross-examination.

2. The verdict, supported by testimony as to each material element of the charge was not as a matter of law, against the manifest weight of the evidence.

Petitioner asks for a review of the evidence presented in this case. A perusal of the testimony will establish that it is neither contradictory nor lacking in the establishment of any element.

Petitioner argues that the reviewing court should substitute its opinion for that of the trier of fact, the jury, when determining the credibility of a witness. Such a substitution is expressly forbidden. *State v. DeHass* (1967), 10 Ohio St. 2d 230.

Further, the record is devoid of any mention of renewal of the Motion for Acquittal pursuant to Criminal Rule 29. The law is well established that an accused waives his right to a directed verdict of acquittal at the close of the State's case by thereafter introducing evidence and failing to renew the motion at the close of all the evidence. *State v. DeBoe* (1977), 62 Ohio App. 2d 102; *State v. Hairston* (1977), 60 Ohio App. 2d 220.

CONCLUSION

In conclusion, the Respondent, State of Ohio, submits that the Petition herein fails to represent any question of constitutional dimension justifying review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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